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JUN - 3 1996

June 3, 1996

HAND-DELIVERED

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554


Re: *Amendment to the Commission's Regulatory Policies Governing Domestic
Fixed Satellites and Separate International Satellite Systems, 11 FCC Rcd
2429 (1996), summary published, 61 FED. REG. 9946 (Mar. 12, 1996):
Consolidated Reply to Oppositions to Petition for Reconsideration*

Dear Mr. Secretary:

On behalf of Orion Network Systems, Inc. ("Orion"), and pursuant to Section 1.429(g) and (h) of the Commission's Rules, I enclose herewith for filing an original and eleven (11) copies of Orion's Consolidated Reply to Oppositions to Petition for Reconsideration in the proceeding noted above.

Please stamp and return to this office the enclosed copy of this filing designated for that purpose. Kindly direct any questions concerning this material to the undersigned.

Respectfully submitted,


Eric T. Werner

Enclosures

cc: Richard H. Shay, Esquire
April McClain-Delaney, Esquire
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BEFORE THE
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JUN - 3 1996

In the Matter of)

)
Amendment to the Commission's)
Regulatory Policies Governing)
Domestic Fixed Satellites and)
Separate International Satellite)
Systems)

IB Docket No. 95-41

TO: The Commission

**CONSOLIDATED REPLY TO OPPOSITIONS
TO PETITION FOR RECONSIDERATION**

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TO: The Commission

**CONSOLIDATED REPLY TO OPPOSITIONS
TO PETITION FOR RECONSIDERATION**

ORION NETWORK SYSTEMS, INC. (hereinafter "Orion"), by its attorneys and pursuant to Section 1.429(g) of the Commission's Rules, 47 C.F.R. § 1.429(g) (1995), hereby replies to the Oppositions filed May 21, 1996, by GE American Communications, Inc. ("GEAC"), and Hughes Communications Galaxy, Inc. ("HCG"),^{1/} to Orion's Petition for Reconsideration ("Petition") of the Federal Communications Commission's ("FCC" or "Commission") *Report and Order* in the above-captioned proceeding.^{2/}

I. NEITHER THE FACTUAL RECORD NOR THE COMMISSION'S WAREHOUSING RATIONALE SUPPORT APPLICATION OF THE "ONE-STAGE" FINANCIAL QUALIFICATION STANDARD TO FSS APPLICANTS IN THE U.S. INTERNATIONAL ARC AND NO BASIS EXISTS TO PRESERVE THE UNEQUAL SUBSTANTIVE FINANCIAL SHOWINGS NOW REQUIRED OF APPLICANTS

In its Petition, Orion cogently demonstrated that the Commission's decision to subject applicants specifying orbital locations in the international arc to the same "one-stage" financial qualification standard formerly applied only to domsat applicants was fundamentally flawed and misguided. Specifically, Orion

^{1/} Opposition of GE American Communications, Inc., filed May 21, 1996; Opposition of Hughes Communications Galaxy, Inc., to Petitions for Reconsideration, filed May 21, 1996 (collectively, "Oppositions").

^{2/} *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, 11 FCC Rcd 2429 (1996), summary published, 61 FED. REG. 9946 (Mar. 12, 1996) (*Report and Order* in IB Docket No. 95-41) [*"Report and Order"*].

observed that, in the *Report and Order*, the Commission had abandoned the notion that U.S. FSS applicants in the international arc would be able to rely on a "justified expectation of revenues" in order to satisfy their financial qualifications requirements. *See* Petition at 6-7. Instead, Orion noted, the Commission rested its decision relative to the financial qualifications issue solely on the purported need to prevent the warehousing of orbital resources in the international arc. *Id.* at 7; *Report and Order*, 11 FCC Rcd at 2435.

Orion explained that the Commission's concern about warehousing in the international arc lacked a factual predicate because, unlike the domestic arc, the international arc does not present the same severe congestion problems which had historically been used to justify application of the one-stage financial qualification standard to domsat applicants. Petition at 8-9. Moreover, even assuming that such warehousing were a valid concern, Orion observed, the Commission's prescribed solution -- the one-stage financial qualification standard -- does not remedy the problem: It does absolutely nothing to prevent warehousing either by international satellite organizations (*e.g.* Intelsat and Inmarsat) or foreign-licensed satellite operators, *id.* at 7-8,^{3/} or by the entities with arguably the greatest incentive to warehouse -- the large, self-funded U.S.-licensed operators. *Id.* at 8.^{4/}

Moreover, Orion identified a critical inequity between the substantive requirements the Commission demands from non-self-financed entities in order to demonstrate their financial qualifications and the demands it places on so-called self-financed entities in this regard which make it much more

^{3/} It is noteworthy that, even in the domestic arc the one-stage financial qualification showing fails to prevent warehousing by foreign-licensed satellite operators or by IGOs such as Intelsat and Inmarsat. Competitors filing in foreign jurisdictions -- not subject to such processing hurdles -- have the ability to get to the ITU before U.S. licensees in both the domestic and the international arc.

^{4/} In its Petition, Orion illustrated how the large, highly-capitalized entities like HCG and GEAC have the incentive to limit the number of available transponders to preserve and maintain their market power. Orion further underscored that the Commission's new financial qualification regime enhances large entities' ability to engage in this conduct by keeping competitors out: Because such entities easily pass through the Commission's financial qualifications requirements as "self-funded" applicants, they have the ability to apply for and stockpile orbital locations to the detriment of smaller U.S. competitors who confront much more stringent financial qualification requirements.

difficult for the former to obtain and to present their financing. Thus, contrary to the Commission's stated objective to "ensure that the U.S. public has available to it the widest range of satellite service offerings from the greatest number of competitors possible,"^{5/} the Commission's action effectively undermined small applicants' ability to remain competitive in the market, and it did so without a rational basis. In short, Orion explained, application of the one-stage qualification standard as the Commission proposes would serve only to disadvantage unfairly the very firms whose entrepreneurial initiatives were instrumental in bringing about the competitive marketplace that now exists for international fixed satellite services.

A. U.S. FSS Applicants in the International Arc Continue to Face Significant Uncertainties Relative to International Coordination Processes

HCG's and GEAC's respective Oppositions offer nothing to dispel the foregoing conclusions. HCG's first response is to parrot once again its oft repeated -- and erroneous -- contention that changes in the Intelsat coordination process have eliminated the uncertainties that historically hindered separate systems operators' ability to obtain financing commitments and justified the two-stage financial qualification scheme. HCG Opposition at 3-4. As it was in the past, HCG is simply wrong in this regard.

In point of fact, private operators of international satellite systems continue to confront very difficult international coordination proceedings and other market access barriers. For example, in addition to Intelsat coordination, international satellite operators must undertake ITU coordination with other affected administrations. U.S. international system operators must also overcome foreign entry barriers such as the need to secure authorizations from the foreign administrations for ground segment equipment in the each of the countries to be served. Notwithstanding certain changes in the Intelsat

^{5/} *Report and Order*, 11 FCC Rcd at 2435.

Article XIV(d) process, these significant uncertainties continue to make international satellite operation less predictable and, thus, more expensive and financially risky than domsat operation.^{6/}

Significantly, for its part, GEAC does not dispute that Intelsat coordination and the need to consult with foreign administrations present impediments to applicants' ability to obtain financing. GEAC Opposition at 3-4. Instead, GEAC suggests that the Commission's waiver process affords an adequate safeguard against this eventuality. *Id.* This argument is without merit.

The waiver process cited by GEAC provides U.S. international applicants little assurance of protection from the uncertainties of the international regulatory system because Intelsat Article XIV(d) procedures and international consultations do not take place until after the Commission has granted a conditional authorization. Under the formulation in the *Report and Order*, however, an applicant would have to obtain a waiver before receiving such conditional authority and, in order to obtain the waiver, would be required to provide, *inter alia*, an "explanation as to why . . . financing could not be obtained." *Report and Order*, 11 FCC Rcd at 2435. Thus, at the time of the applicant's waiver request, the international regulatory hurdles would still lie ahead, and the Commission has given no indication that it would accept such prospective impediments as sufficient "explanation" to support a waiver.

^{6/} Moreover, even the changes in the Article XIV(d) process have not eliminated the uncertainties private international operators face in connection with Intelsat coordination. As Orion stated in its Reply Comments below in response to HCG's argument:

Contrary to HCG's assertion, the continuing reality is that the proposals of U.S. separate system operators for international service generally involve the use of orbital slots over the ocean regions of the world -- the same slots that are being proposed for similar service by INTELSAT and other nations. The resulting uncertainty with respect to co-located or adjacent proposals justifies the continuation of the two-stage financial qualifications policy.

Reply Comments of Orion Network Systems, Inc., in IB Docket No. 95-41, filed June 6, 1995, at 2. Indeed, as the Commission is well aware, Intelsat continues to use the Article XIV(d) process to shield itself from competition: witness Columbia Communications Corporation's recent experience in its negotiations with Intelsat relative to Columbia's use of TDRS-4 at 41° W.L.

B. "Warehousing" Does Not Provide A Rational Basis for the Application of the One-Stage Financial Qualification Standard

HCG next attempts to prop up the *Report and Order's* warehousing rationale. HCG recites the history of the Commission's decision to employ the one-stage financial qualification standard in the domestic arc and then simply asserts in conclusory fashion that the same anti-warehousing concerns apply in the international arena. HCG Opposition at 4-6. However, HCG provides no evidence that the international arc exhibits anything approaching the sort of congestion which in the domestic arc motivated the Commission to act relative to domestic applications.^{7/} Rather, HCG attempts to substantiate its point by pointing to what it suggests are examples of warehousing by international separate system applicants. *Id.* at 5.

In a particularly grievous mischaracterization, HCG cites Orion's applications for 37.5° and 47° W.L. in this context. While chiding Orion for not commencing operations from 47° in a timely fashion, HCG entirely obscures the fact that Orion has launched and is presently operating from 37.5°. The Commission should not be misled by HCG's gambit: Far from exemplifying warehousing, both 37.5° and 47° illustrate the impact that international and domestic regulatory hurdles have had on financing separate satellite systems and the wisdom of the two-stage process. In point of fact, Orion's pursuit of launch and operations for these systems has been very timely in view of the circumstances that attended these applications.

^{7/} In *Licensing Space Stations in the Domestic Fixed-Satellite Service*, 58 Rad. Reg. 2d (P & F) 1267 (1985), the case cited by HCG at 4, the Commission confronted a domestic satellite processing round in which 21 entities had filed 85 applications for satellites. *Id.* at 1267. In noting that domestic orbital locations were becoming less available, the Commission observed that at that time 32 orbital locations had already been assigned to domsat operators and that its action in that case would result in the assignment of yet another 22 locations. *Id.* at 1271 & n.14. By contrast, far from establishing similar congestion in the international arc, HCG merely claims that there is "growing interest" in both U.S. domestic and international locations in support of which it points to applications from 3 applicants for 6 orbital locations. HCG Opposition at 7 & n.17. Moreover, 4 of these applications, filed by GEAC (for 85° and 87° W.L.) and EchoStar KuX Corporation (for 85° and 91° W.L.) respectively, while they may propose jointly to offer international and domestic services, propose slots which are located in the domestic arc.

While the coordination and financing of these systems has, indeed, taken considerable time, as the Commission (and HCG) is well aware, these applications represented a milestone in international satellite competition. As among the very first separate satellite systems, these applications confronted significant international coordination challenges and, as the first such applications to rely on broad multinational investment, they experienced further delays related to the regulatory clearance of Orion's financing structure.^{8/} In the final analysis however, as HCG concedes, Orion did demonstrate itself financially qualified as the Commission so recognized in its licensing order. In any event, even assuming HCG's implication of warehousing by non-self-financed applicants were true (which it is not), it is nevertheless irrelevant because neither HCG nor the Commission have established the existence of the sort congested demand for international orbital positions that would make such warehousing an immediate problem warranting the Commission's draconian "remedy "

Underscoring the insincerity of its concern about warehousing, HCG ignores entirely Orion's argument that the one-stage financial qualification standard would not prevent such conduct by foreign entities.^{9/} Moreover, HCG fails to rebut the conclusion that the one-stage qualification rule would even permit such self-financed operators as itself to engage in warehousing.^{10/} To be sure, in its Opposition, HCG challenges this conclusion, observing that the due diligence milestones to which domsat applicants are subject prevent them from engaging in warehousing. HCG Opposition at 6 n.14. However, this

^{8/} See *Orion Satellite Corporation*, 5 FCC Rcd 4937 (1990). The present delay in commencing operations from 47° stems from marketplace changes that have taken place during the intervening years. The dissolution of the Soviet Union and related changes in the geopolitical landscape forced Orion to modify its priorities as between its proposed satellites at 47° and 12°. As a result of the opening of new potential telecommunications markets in Eastern Europe, Orion intends to launch its 12° satellite prior to the one at 47°. This change in launch scheduling has necessarily postponed the inauguration of service on the 47° satellite, but this does not constitute "warehousing" or reflect any intention not to use the slot. Indeed, Orion recently applied to modify its 47° satellite proposal to include beams for service to South America. Public Notice Report No. SPB-48, released May 30, 1996, File No. 113-SAT-MP-96.

^{9/} Even GEAC acknowledged that "warehousing by foreign providers is a problem." GEAC Opposition at 5.

^{10/} See note 4, *supra*.

argument withers under scrutiny: As even GEAC concedes, such construction milestones do not prevent warehousing; they merely place an outside limit on how long a self-funded applicant can hold onto an orbital assignment without using it. *See* GEAC Opposition at 4. The Commission has no guarantee that an applicant that qualifies on the basis of its balance sheet will, in fact, construct by a specified milestone date. It is this fact which most clearly demonstrates the inequity in the Commission's substantive financial qualification rules for FSS applicants.

C. The Different Financial Qualification Standards for Self-Financed and Non-Self-Financed FSS Applicants Must be Harmonized; the Present Scheme is Irrational, Unfair and Anti-Competitive

As Orion stated in its Petition, allowing "self-financed" applicants to qualify simply on the basis of a balance sheet or a qualified letter of assurance from the applicant's parent entity, while requiring non-self-financed applicants to present binding, unqualified commitments of financing from their funding sources, impairs competition by placing large companies on a more favorable regulatory footing and reducing the economic opportunities for the small, entrepreneurial businesses that led the way in bringing competition to the international satellite market in the first place. Petition at 10-13.^{11/}

Neither HCG nor GEAC dispute the existence of this disparity in the Commission's financial qualifications requirement. Indeed, GEAC fails to address the issue at all, apparently conceding the appropriateness of Orion's request that the requirements be equalized to permit non-self-financed applicants to rely on financial commitments with contingencies similar to those permitted for self-financed entities. For its part, HCG asserts only that this inequitable treatment is appropriate in order to protect "applicants willing and able to go forward immediately." HCG Opposition at 8. But this argument

^{11/} Indeed, as Orion indicated in its Petition, and above, the Commission has no guarantee that the funds represented by a balance sheet are unencumbered and will actually be available to finance the system if authorized. Petition at 11. To the extent the Commission requires fully-negotiated, non-contingent commitments of financing from non-self-funded entities, it should require so-called self-funded applicants to submit with their balance sheets a resolution from their corporate board (or the board of the parent entity supplying the funding) expressing the board's unconditional and unequivocal intention to construction the system if the license is awarded.

conflicts with the pro-competitive thrust of the *Report and Order* wherein the Commission stated that its "primary obligation is to ensure that the U.S. public has available to it the widest range of satellite service offerings from the greatest number of competitors possible." *Report and Order*, 11 FCC Rcd at 2435 (emphasis added).

The Commission's present financial qualifications rules reduce the opportunities for smaller entities to secure financing and thereby reduce the number of possible competitors able to go forward. If the Commission is to give full effect to its goal of advancing competition, it must afford smaller entities the same financing flexibility available to larger applicants. Equalizing the substantive standards applicable to self-financed and non-self-financed entities would not, as HCG claims, "eviscerate the financial qualification standard altogether," HCG Opposition at 10; rather, it would place all applicants on an equal footing and facilitate small applicants' ability to obtain financing, thereby ensuring that the public receives all the price and service benefits of a fully-competitive marketplace rather than one dominated by a few "well-heeled" providers.

Notwithstanding HCG's and GEAC's arguments, the one-stage financial qualification standard has been proven neither necessary to combat warehousing nor effective at preventing warehousing by the providers with the greatest incentive to warehouse. Instead, it would operate only to impair competition by driving smaller, entrepreneurial firms from the marketplace. Accordingly, the Commission should abandon it until such time as orbital congestion may warrant revisiting the issue. However, in keeping with the pro-competition objectives of the *Report and Order*, the Commission should harmonize the substantive requirements of its financial qualifications rules to equalize the showing that all FSS applicants are required to present to establish their financial qualifications.

II. PROCESSING ROUNDS SHOULD NOT BE EMPLOYED FOR FIXED SATELLITE SYSTEMS PROPOSED FOR LOCATIONS OUTSIDE OF THE TRADITIONAL DOMESTIC ORBITAL ARC

In the Petition, Orion identified the policy considerations that make the Commission's decision to employ processing rounds unwise and which warrant reconsideration of that action. Specifically, Orion

noted, the use of processing rounds necessarily reduces the speed with which U.S. applicants can pass through the U.S. regulatory system and advance to international coordination of their orbital locations. Petition at 14. Orion noted that avoidance of such delays in the issuance of authorizations is critical if U.S. entities are to remain competitive in the international marketplace and that the delay associated with processing rounds could enable foreign competitors to win the race to the ITU thereby enabling them to secure choice slots. *Id.* at 14-15.

By contrast, the Oppositions support the use of processing rounds for international applications based largely on the notion that once the Commission abandoned the regulatory distinctions between domsats and separate systems, it had no logical basis upon which to process these applications differently. *See* HCG Opposition at 12; GEAC Opposition at 8. However, this "as night follows day," reasoning is fallacious. While the *Report and Order* eliminated the distinction between domsats and separate systems relative to the regions in which they could provide service, it did not summarily sweep away the factual realities that distinguish domestic and international segments of the orbital arc. It is these distinctions which warrant use of processing rounds for applicants in former but not in the latter.

As Orion's Petition observed, processing rounds have been employed domestically because of the considerable mutual exclusivity problems that occurred in that highly-congested portion of the arc. By contrast, the lower demand for slots -- and lower congestion -- in the international segment of the arc have not presented the sort of mutual exclusivity problems that warranted processing rounds. Petition at 14. While the Commission's action may produce some increased demand for these locations in the future, at present such demand is not so formidable as to justify the added delay and burden associated with processing rounds, particularly when the Commission is exploring alternative methods for resolving mutual exclusivity problems. In light of these circumstances, logic does not support use of processing rounds and, contrary to HCG's and GEAC's assertions, nothing compels the Commission to use them.

Moreover, Orion also observed in its Petition that the use of processing rounds for international (and even, perhaps, domestic) orbital slots also creates an incentive for U.S. entities to "shop"

jurisdictions in order to evade the FCC's regulatory delays by seeking orbital slots through foreign administrations. *Id.* at 15. Orion specifically cited as an example the announcement earlier this year that one of GEAC's subsidiaries had reached an agreement with Gibraltar for the filing of applications for twelve orbital slots with the ITU. *Id.* HCG's attempt to rebut this argument in its Opposition^{12/} is best refuted by the fact that GEAC itself did not make such an attempt. Evidently, GEAC concedes that it was, indeed, endeavoring to circumvent delays associated with the Commission's regulatory processes.

As Orion previously stated, to the extent processing rounds and other FCC regulatory handicaps motivate other U.S. providers to seek licensing overseas, the Commission's control over the regulatory process and its influence will diminish. Thus, the Commission should clarify that processing rounds will not be used to award licenses to applicants specifying traditionally international orbital locations until such time as demand in that segment of the orbital arc clearly necessitates such a response.

III. CONCLUSION

For the foregoing reasons, the Commission should reject the arguments raised by the Oppositions and reconsider its *Report and Order* in IB Docket No. 95-41 as requested in Orion's Petition.

Respectfully submitted,

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Dated: June 3, 1996

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^{12/} HCG Opposition at 15 n.43.

CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, a secretary in the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, hereby certify that I have this date sent copies of the foregoing "Consolidated Reply to Oppositions to Petition for Reconsideration" to the following by First Class United States mail, postage prepaid:

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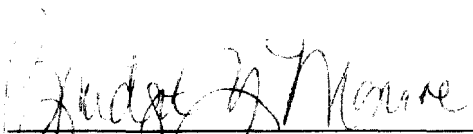
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